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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 518

MORELAND H. HOGAN AND INTERNATIONAL PARK CORPORATION, *Petitioners*

v.

IVOR B. CLARK, INC., *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

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v.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE THE CHIEF JUSTICE OF THE UNITED STATES OF AMERICA AND THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioners, Moreland H. Hogan and International Park Corporation, respectfully pray that a writ of certiorari issue to the United States Court of

Appeals for the Second Circuit to review here the decision and judgment of that court rendered on June 14, 1968, in the case of *Ivor B. Clark, Inc., plaintiff*, v. *Moreland H. Hogan, International Park Corporation, and International Office Park, Inc., defendants*, the same being numbered 32287/88 on the docket of said Court.

OPINION BELOW

The judgment of the court below was rendered and entered, without opinion, on the 14th day of June, 1968, at the conclusion of the oral argument. A copy of the judgment is appended hereto (Appendix A).

GROUNDS ON WHICH JURISDICTION IS INVOKED

The judgment of the United States District Court for the Southern District of New York, which was affirmed by the decision and judgment of the United States Court of Appeals for the Second Circuit here sought to be reviewed, was erroneous, was an abuse of the discretion vested in the District Courts of the United States by Rule 37(b)(2) of the Federal Rules of Civil Procedure, was entered without due process of law, and deprived your petitioners in certiorari of due process of law in violation of the Fifth Amendment to the Constitution of the United States.

(i) The date of the judgment sought to be reviewed is June 14, 1968. It was entered on the same date.

(ii) No motion for rehearing was filed, and no order has been granted extending the time within which to petition for certiorari.

(iii) Jurisdiction is invoked under Section 1254(1), Title 28, of the United States Code.

QUESTIONS PRESENTED FOR REVIEW

1. Whether a District Court is authorized by Rule 37(b)(2) of the Rules of Civil Procedure to strike the pleadings of a party and enter a judgment by default against him for failure to produce documents pursuant to an order entered under Rule 34 of the Federal Rules of Civil Procedure, in the absence of an affirmative showing that the documents were at the time of the order in the possession, custody or control of the party.

2. Whether a District Court is authorized by Rule 37(b)(2) of the Federal Rules of Civil Procedure to strike the pleadings of a party and enter a judgment by default against him for failure to produce documents pursuant to an order entered under Rule 34 of the Federal Rules of Civil Procedure, without making an express finding of fact that there has been a willful refusal by such party to produce documents which were at the time of the order in his possession, custody or control.

3. Whether the order and judgment of the United States District Court for the Southern District of New York striking the answer of the defendants Moreland H. Hogan and International Park Corporation and entering judgments by default against them, which action and judgments were affirmed by the decision and judgment here sought to be reviewed, was "just" as required by Rule 37(b)(2) of the Federal Rules of Civil Procedure.

4. Whether the order and judgment referred to in the preceding paragraph was, under the facts and circumstances, an abuse of the discretion vested in the District Courts by Rule 37(b)(2) of the Federal Rules of Civil Procedure.

5. Whether, after striking the answer of a defendant for failure to produce documents pursuant to an order entered under Rule 34 of the Federal Rules of Civil Procedure, a District Court has authority under Rule 37(b)(2) of the Federal Rules of Civil Procedure to enter a judgment by default against the defendant where the defendant, a resident of a State other than that in which the court is located, has in his pleadings, by way of an affirmative defense, challenged the court's jurisdiction on the ground it has no jurisdiction of the person, and there has been no determination of that issue.

6. Whether the entry of a judgment by default against a defendant in the circumstances set out in the preceding paragraph would deprive the defendant of due process of law in violation of the Fifth Amendment to the Constitution of the United States.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Rule 34 of the Federal Rules of Civil Procedure, Title 28, United States Code (Appendix B).

Rule 37(b)(2) of the Federal Rules of Civil Procedure, Title 28, United States Code (Appendix C).

The Fifth Amendment to the Constitution of the United States which reads, in part, as follows: "No person shall be . . . deprived of . . . property without due process of law".

STATEMENT OF THE CASE

Ivor B. Clark, Inc., a corporation organized under the laws of the State of New York, filed a complaint in the United States District Court for the Southern District of New York, against Moreland H. Hogan, a

citizen of the State of Georgia, and International Park Corporation, a corporation organized under the laws of Georgia and having its principal place of business in that State, praying judgment in excess of $10,000.00 exclusive of interest and costs, for breach of a contract alleged to have been made in New York.

> [International Office Park Corporation also was named as a defendant, but that corporation is not directly involved because no judgment was entered against it.]

The basis for federal jurisdiction was diversity of citizenship.

Copies of the complaint and summons were served on the defendants Moreland H. Hogan and International Park Corporation in the State of Georgia.

The defendants Moreland H. Hogan and International Park Corporation filed a joint answer in which they denied the material allegations of the complaint and set up the following affirmative defense:

> "As and for a Second Complete Affirmative Defense to Plaintiff's First and Second Claims."
>
> 15. The court lacks jurisdiction over the persons of defendants Hogan and International Park Corporation in that they have not transacted any business in the State of New York relative to the subject-matter of this action and the Court does not otherwise have jurisdiction".

The defendants' affirmative defense of lack of jurisdiction in the court has never been heard and determined.

The court entered an order (Appendix D) under Rule 34 of the Federal Rules of Civil Procedure direct-

ing the defendants Moreland H. Hogan and International Park Corporation to either produce certain documents in the State of New York for inspection and copying by the plaintiff or pay to the plaintiff the traveling expenses and fees of an attorney for the plaintiff to go to the State of Georgia for the purpose of there inspecting and copying such documents.

The plaintiff subsequently moved for an order under Rule 37(b)(2) of the Federal Rules of Civil Procedure striking the answer of the defendants Moreland H. Hogan and International Park Corporation "on the ground they have refused to obey" the order requiring the production of the documents.

Thereupon, the defendant Moreland H. Hogan (who is President of the defendant International Park Corporation) submitted to the court an affidavit in which he said, among other things:

> "I have made a diligent search of the records of International Park Corporation and have forwarded those documents which pertain to the above mentioned case to my attorney, Mr. John L. Hawkins, of the firm of Boyden, Sarnoff & Hawkins, 140 Broadway, New York, New York. . . . I have not deliberately or otherwise withheld any documents pertaining to the case".

The court then entered an order (Appendix E) reciting that the order directing the defendants to produce the documents was entered without opposition and that "from this fact, we infer that when these documents were directed to be produced, not only were they in existence but they were in the possession of or under the control of said defendants".

The order provided that "unless the documents called for are produced in this District on or before Jan-

uary 22, 1968, this motion will be granted and an order may in that event be submitted striking the answers of said defendants".

Thereafter, the defendant Moreland H. Hogan submitted a second affidavit in which he stated that he had made a further diligent search and could not locate the papers called for other than those he had sent to his New York attorneys to be produced in the proceeding.

Thereupon, the court, acting on its "inference" that the documents were in the defendant's possession, custody or control, entered an order (Appendix F) striking the answer of the defendants Moreland H. Hogan and International Park Corporation and directing that judgment be entered against Moreland H. Hogan on the first claim of the complaint "in the sum of $85,000.00 with interest thereon from the 1st day of July, 1965", and that judgment be entered against Moreland H. Hogan and International Park Corporation "in the sum of $77,000.00, together with interest thereon from the 1st day of April, 1966 . . .".

Judgment was entered against the defendants Moreland H. Hogan and International Park Corporation as directed, and they filed an appeal to the United States Court of Appeals for the Second Circuit, which Court affirmed the judgment entered by the District Court (Appendix A).

REASONS FOR ALLOWING THE WRIT

We respectfully say that the writ of certiorari ought to be granted in the case at bar because the United States Court of Appeals for the Second Circuit, in affirming the judgment of the United States District Court for the Southern District of New York, decided

federal questions of gravity and importance which have not been, but should be, settled by this Honorable Court.

The effect of its decision and judgment was to hold:

1. That the District Courts are authorzied by Rule 37(b)(2) of the Federal Rules of Civil Procedure to strike the pleadings of a party and enter a judgment by default against him for failure to produce documents pursuant to an order entered under Rule 34 of the Federal Rules of Civil Procedure, without an affirmative showing that the documents were at the time of the order in the possession, custody or control of the party.

There was no affirmative showing that the documents ordered to be produced were in the possession, custody or control of the defendants.

In its order of September 2nd, 1967 (Appendix D), the District Court directed the defendants Moreland H. Hogan and International Park Corporation to either produce certain documents in New York or pay the fees and expenses of plaintiff's counsel in going to Georgia for the purpose of inspecting and copying the documents.

On November 13th, 1967, the defendant Hogan submitted an affidavit (Appendix G), which, though couched in the language of a layman and less definite than might be desired, showed clearly that the defendants did not have in their possession, custody or control any of the documents which had not been forwarded to their New York counsel for production.

However, the District Court disregarded this affidavit, and in its order of January 16th, 1968 (Appendix E) that the motion to strike the defendants' answer would be granted unless the docu-

ments were produced in New York "on or before January 22, 1968," took the position that since the order of September 2nd, 1967, requiring their production was entered "without opposition", it had the right to "infer that when the documents were directed to be produced, not only were they in existence but they were in the possession of or under the control of said defendants".

2. That the District Courts are authorized by Rule 37(b)(2) of the Federal Rules of Civil Procedure to strike the pleadings of a party and enter a judgment by default against him for failure to produce documents pursuant to an order entered under Rule 34 of the Federal Rules of Civil Procedure, without making an express finding of fact that there has been a willful refusal by such party to produce documents which were at the time of the order in his possession, custody or control.

In its order of February 8, 1968, striking the defendants' answers and directing that judgments be entered against the defendants (Appendix F), the District Court merely recited its previous order of January 16, 1968, and stated that "there is no just reason for delay in entry of final judgment against defendants . . .".

3. That in a case where a defendant has in his pleadings, by way of an affirmative defense, challenged the court's jurisdiction on the ground it has no jurisdiction of the person, a District Court may, after striking such defendant's answer pursuant to the provisions of Rule 37(b)(2) of the Federal Rules of Civil Procedure lawfully enter a judgment by default against him, without first determining the question raised as to its jurisdiction.

> We do not believe there can be any question that the entry of the judgment deprived the defendants of due process of law. They had the right to be heard on the issue of whether the District Court in New York was without jurisdiction, and that issue will be forever precluded by the judgment, if the judgment is allowed to stand.

We also submit that the action of the District Court in striking the defendants' answer and entering judgment by default against them, was capricious and arbitrary and an abuse of the discretion vested in the District Courts by Rule 37(b)(2).

It will be seen that the order of January 16, 1968 (Appendix E) and the order striking the defendants' answer were entered without a hearing. The District Court simply "inferred" that the documents not produced were in the possession or control of the defendants. Surely, justice would require that the Court give the defendants an opportunity to be heard before resorting to the drastic action of striking their answer.

WHEREFORE, your petitioners pray that a writ of certiorari issue to the United States Court of Appeals for the Second Circuit in order that the decision and judgment of that court affirming the judgment of the United States District Court for the Southern District of New York may be reviewed and corrected.

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Of Counsel:

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the fourteenth day of June, one thousand nine hundred and sixty-eight. Present:

HON. J. JOSEPH SMITH,
HON. IRVING R. KAUFMAN,
HON. PAUL R. HAYS,
Circuit Judges

IVOR B. CLARK CO., INC., *Plaintiff-Appellee,*

v.

MORELAND H. HOGAN AND INTERNATIONAL PARK CORPORATION, *Defendants-Appellants,*

INTERNATIONAL OFFICE PARK, INC., *Defendant.*

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed, with costs to the appellee.

A. DANIEL FUSARO
Clerk

A true copy,

/s/ A. DANIEL FUSARO
Clerk

APPENDIX B

Rule 34. Discovery and Production of Documents and Things for Inspection, Copying, or Photographing.

Upon motion of any party showing good cause therefor and upon notice to all other parties, and subject to the provisions of Rule 30 (b), the court in which an action is pending may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26 (b) and which are in his possession, custody, or control; or (2) order any party to permit entry upon designated land or other property in his possession or control for the purpose of inspecting, measuring, surveying, or photographing the property or any designated object or operation thereon within the scope of the examination permitted by Rule 26 (b). The order shall specify the time, place, and manner of making the inspection and taking the copies and photographs and may prescribe such terms and conditions as are just. As amended Dec. 27, 1946, effective March 19, 1948.

APPENDIX C

Rule 37. Refusal to Make Discovery: Consequences.

(2) Other Consequences. If any party or an officer or managing agent of a party refuses to obey an order made under subdivision (a) of this rule requiring him to answer designated questions, or an order made under Rule 34 to produce any document or other thing for inspection, copying, or photographing or to permit it to be done, or to permit entry upon land or other property, or an order made under Rule 35 requiring him to submit to a physical

or mental examination, the court may make such orders in regard to the refusal as are just, and among others the following: . . .

(iii) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party; . . .

APPENDIX D

Order, September 2, 1967

IVOR B. CLARK CO., INC. v. MORELAND H. HOGAN, ET AL.

66 Civ. 3003.

All three defendants have a common interest in opposing plaintiff's action. In my opinion, the conversation between defendant Hogan and his attorney, in the presence of attorneys for his codefendants, in preparation for his forthcoming examination by plaintiff, is privileged.

Cf. Continental Oil Company v. *United States,* 330 F. 2d 347 (9th Cir. 1964)

Plaintiff's motion for an order directing Hogan to answer questions as to this conversation is therefore denied.

Plaintiff also moves under Rule 34 for an order directing defendants Hogan and International Park Corporation to produce certain documents for plaintiff's inspection. Defendants consent to the production. Some of the documents are in New York. They shall be produced here.

As to the other documents, the only question is whether they shall be produced in Atlanta where defendants are situated and where the documents are located, or in New York. Plaintiff's attorney was in Atlanta taking other depositions in this case from August 14 to August 18, 1967. Defendants' attorney was there also, indeed plain-

tiff's attorney paid defendants' attorney's travel expenses and an attorney's fee for attendance. This motion had already been made and defendants' attorney knew of it. Apparently he made no offer to permit plaintiff's attorney to examine the documents while he was in Atlanta, as he could easily have done. Under these circumstances, to require plaintiff's attorney to go to Atlanta again at his own expense to examine these documents would be unfair. Accordingly, defendants shall either produce the documents in New York, or, if they elect for their own convenience to produce them in Atlanta, defendants Hogan and International Park Corporation shall pay to plaintiff the traveling expenses of one attorney for plaintiff from New York to Atlanta and return, plus an attorney's fee of $100 per day for each day or part thereof necessarily devoted to such inspection.

So ordered.

EDWARD C. McLEAN
U. S. D. J.

Dated: September 2, 1967

(Filed September 5, 1967)

APPENDIX E

Order, January 16, 1968

IVOR B. CLARK CO., INC. v. MORELAND H. HOGAN, ET AL.

Endorsement

66 Civ. 3003

Plaintiff moves to strike the answers of the defendants HOGAN and INTERNATIONAL PARK CORPORATION because of their failure to produce documents and records ordered to be produced by these defendants by order of Judge McLean entered on September 2, 1967. This order of

Judge McLean was entered without opposition of these defendants; from this fact, we infer that when the documents were directed to be produced, not only were they in existence but they were in the possession of or under the control of said defendants.

When this motion was heard by me on November 9, 1967, at argument I directed that the defendants submit an affidavit of HOGAN, explaining the non-compliance of the defendants. This has not been done and, save for a partial production of a small portion of the total documents covered by the order, there has been no compliance with the order. A totally insufficient, evasive and inadequate statement of HOGAN has since been filed, but it is palpably insufficient to justify defendants' apparent wilful disregard of Judge McLean's order.

Unless the documents called for are produced in this District on or before January 22, 1968, this motion will be granted and an order may in that event be submitted striking the answers of said defendants. So ordered.

/s/ SYLVESTER J. RYAN
U. S. D. J.

Dated: January 16, 1968.

U. S. DISTRICT COURT
FILED
JAN 16 1968
S.D. OF N.Y.

APPENDIX F

IVOR B. CLARK CO., INC., *Plaintiff*

v.

MORELAND H. HOGAN
INTERNATIONAL OFFICE PARK, INC. and
INTERNATIONAL PARK CORPORATION, *Defendants*

66 Civil 3003

Upon the annexed affidavit of Arthur S. Friedman, sworn to the 19th day of February, 1968, and due notice of the submission hereof, and of the aforesaid affidavit, having been given to the attorneys for the defendants, and upon the Order of this Court dated February 8th, 1968, entered as a Judgment by the Clerk on February 13th, 1968, and upon all of the prior pleadings and proceedings heretofore had herein, it is

ORDERED AND ADJUDGED, that plaintiff, Ivor B. Clark Co., Inc., of 666 Fifth Avenue, New York, N. Y., recover of defendants Moreland H. Hogan, of 877 Virginia Avenue, Hapeville, Georgia, and International Park Corporation, of 1001 Virginia Avenue, Hapeville, Georgia, the following:

(a) On the first claim of the complaint, against defendant, Moreland H. Hogan, the sum of $85,000.00, together with interest thereon from the 1st day of July, 1965, in the sum of $13,276.20, amounting together to the sum of $98,276.20, and

(b) On the second claim of the complaint against defendants Moreland H. Hogan and International Park Corporation, the sum of $[illegible],000.00, together with interest thereon from April 1, 1966, in the sum of $8,537.76, amounting together to the sum of $85,537.76,

aggregating as against defendant Moreland H. Hogan the sum of $183,813.96 and as against defendant Inter-

national Park Corporation, the sum of $85,537.76, all together with costs and disbursements to be taxed herein, and that plaintiff have execution therefor.

and it is further

ORDERED AND ADJUDGED, that this Amended Judgment is effective, *nunc pro tunc,* as at February 13, 1968.

SYLVESTER J. RYAN
U. S. D. J.

Dated: New York, N.Y.
February 21st, 1968

Judgment entered 2/21/68
JOHN J. OLEAR, JR.
Clerk

APPENDIX G

Affidavit of Moreland H. Hogan in Opposition to Motion To Strike

November 13, 1967

AFFIDAVIT OF MORELAND H. HOGAN
RE CLARK V. HOGAN, ET AL.

I have made a diligent search of the records of International Park Corporation and have forwarded those documents which pertain to the above-mentioned case to my attorney, Mr. John L. Hawkins of the firm of Boyden, Sarnoff, and Hawkins, 140 Broadway, New York, New York, 10005, on October 18, 1967. Contrary to the statement of attorneys for the Plaintiff that no sales closing information paper was included in my submission of documents, I point out that I did include a document entitled "Sales Closing Statement Between International Office Park, Inc., Seller, and International Park Corporation, Purchaser" dated December 2, 1965.

I contacted my Atlanta attorney, Mr. William G. Grant of the firm of Grant, Spears, and Duckworth, William Oliver Building, Atlanta, Georgia, concerning the documents pertaining to the suit of Surety Investment Company against International Office Park, Inc. and Moreland H. Hogan. Mr. Grant stated that he has now searched his files and is forwarding the related documents to Mr. Hawkins via air mail today (November 13, 1967). Grant further stated that he had not earlier forwarded these documents to me or International Park Corporation; therefore, I was not able to furnish these documents from my files.

I have not deliberately or otherwise withheld any documents pertaining to this case. The attorneys for the Plaintiff conducted a search in Atlanta and obtained a copy of the files of Barrett and Citizens and Southern National Bank and others. These copies were obtained prior to October 18, 1967, at which time I forwarded documents to Mr. John Hawkins. Mr. Hawkins, who was present during the Atlanta depositions, informed me that certain documents were produced from the files of the aforementioned groups; therefore, I did not attempt to obtain copies of these documents, which I did not have in my files, because of the information obtained by Mr. Hawkins. It is my belief that the Plaintiff has obtained a very complete record of the documents pertaining to this case.

It has been pointed out in several instances in the past that the attorneys for the Plaintiff have consistently harassed the undersigned and made many unfounded accusations against both the undersigned and his attorneys.

Due to the fact that I operate a one-man shop and to the fact that the demands made on my time have been tremendous and injurious to my business, in this case where the Plaintiff is already receiving monthly payments on a very large fee totaling $46,000, I respectfully request that these preliminaries be halted and that the case be tried in Court and at the convenience of the Court.

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v.

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Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

Respondent, Ivor B. Clark Co., Inc. submits this brief in opposition to the petition for writ of certiorari herein.*

JUDGMENT BELOW

At the conclusion of oral argument before the Court of Appeals for the Second Circuit, the Judgment of the District Court was unanimously affirmed in open Court. At the same time, the Court of Appeals denied, as academic, respondent's motion to dismiss petitioners' appeal. That motion rested on the ground that, by reason of still further refusal of petitioners (after Judgment) to comply with

*Petitioners and respondent are sometimes herein referred to as defendants and plaintiff, respectively.

Court rules (as to respondent's efforts to collect the judgment), petitioners had debarred themselves from the right to prosecute their appeal.

JURISDICTION

The Petition for certiorari is, by any standard, an extraordinary document. It is, at one and the same time, bereft entirely of any case citation, oblivious to the existence of the well-established criteria governing this Court's certiorari jurisdiction, and either obliterative or obfuscatory of even the most elemental facts of this case.

Petitioners' failure to cite supporting case authority is explicable by reference to the simple fact that there is none for the questions contrived by petitioners. Petitioners' failure to show that their questions comply with the requirements of certiorari jurisdiction—their failure to show that there is either a conflict among the Circuits, that an important, unsettled question of Federal law is presented, or that the Court of Appeals has acted in a way which so far departs from the accepted course of judicial proceedings to require this Court's intercession—is also understandable. There simply is not a possibility that anything in this case could satisfy one of those grounds. United States Supreme Court Rule 19(b).

The Petition here is really the equivalent of a quickly drawn, lightweight argument as if this case were first on appeal to the Court of Appeals. The Petition simply reflects a refusal by petitioners to recognize that they are not entitled to two appeals in the federal system, and that this Court does not function on certiorari as an automatic second reviewer of the Court of Appeals. *Magnum Co.* v. *Coty* 262 U. S. 159 (1923).

It is also noteworthy that the fifth and sixth supposed questions presented for review were never presented in either of the Courts below. Thus, even were they meritorious

certiorari questions—which they are not—they would not, except under extraordinary circumstances, qualify for consideration by this Court. *Lawn* v. *United States* 355 U. S. 339, 362 (1958), *California* v. *Taylor* 353 U. S. 553, 556 (1957).

STATEMENT OF THE CASE

Petitioners' Statement of the Case—even when viewed as purported support for their improvised "Questions Presented for Review"—is so truncated that no one would fairly understand how the Court of Appeals was so little impressed with the substantiality of petitioners' appeal that it affirmed the judgment of the District Court immediately upon conclusion of oral argument, and in open Court. Therefore, putting aside the fact that none of petitioners' questions even hints at meritorious certiorari jurisdiction, the total insubstantiality—the sham—of certain of the questions can only be appreciated in light of a fuller exposition of indisputable facts. We amplify the Statement of the Case with an awareness that this Court may well conclude that this is superfluous, and that the Petition, on its face, judged by the traditional requirements of certiorari, requires instant denial without more.

The District Court's Judgment arose out of an Order (4a-5a*) made by Hon. Sylvester J. Ryan, U. S. D. J., under Rule 37(b) of the Federal Rules of Civil Procedure wherein, 4 months after the making of an Order (3a-4a) for discovery under Rule 34 of the Federal Rules of Civil Procedure (Hon. Edward C. McLean, U. S. D. J.) Judge Ryan found that petitioners, not having produced what was required, were guilty of "wilful disregard" of the Order of Judge McLean (5a). Petitioners were afforded still another

*"a" references are to pages of Petitioners' Appendix. "R" references are to pages of the Record filed in this Court.

opportunity to comply, failing which their answers were to be stricken (5a). Upon petitioners' continued obdurate disobedience their answers were stricken and judgment entered (R. 576-591).

The Claims

Respondent, a well known mortgage financing specialist, sued for breach of a written agreement (R. 9) by which it was retained by petitioners "exclusively" to arrange certain commitments for financing in connection with defendants' vast real estate project known as the International Office Park Project.

The first claim of the complaint sought recovery of a stipulated fee for plaintiff having procured for those defendants in the Summer of 1965, a commitment in the sum of $4,250,000 from James Talcott, Inc. (R. 1-3). The second cause was based on the claim that while the exclusive written agreement was still in effect, and after certain temporary financing had been arranged for defendants by plaintiff, (permanent replacement of which was still being sought), defendants surreptitiously decided to try to, and did, arrange for such financing through others, without notice to or knowledge of the plaintiff. (R. 3-6)

In April 1966, on the pretext that it was allegedly appropriate to cancel the existing written agreement, which had been made with petitioner, Moreland H. Hogan, ("Hogan") and his corporation, International Office Park Inc., ("Office Park") and to substitute in place thereof an agreement involving Hogan's new corporation—petitioner, International Park Corporation, ("Park")—the old agreement was cancelled (R. 5). However, prior to that time, by months, Hogan and Park had secretly retained other brokers, arranged with them for substantially reduced brokerage commissions, and had made application for and had assurance of permanent financing for the project—permanent financ-

ing which was in fact provided by Mutual of New York in the sum of $3,850,000.00. The second count of the Complaint sought recovery of the commission provided in the written agreement for this permanent financing (R. 3-6).

Petitioners' answer admitted the making of the agreement and then generally denied liability (R. 59-63).

Petitioners' Early Motions:

The action was commenced in September of 1966. Service was effected in Georgia pursuant to Sections 302 and 313 of the Civil Practice Law and Rules of the State of New York. Almost simultaneously with the service of Answer by Hogan and Park, and after the service of notice to take the deposition upon oral examination of Hogan, petitioners moved for a change of venue (R. 76 *et. seq.*). Hogan moved as well for an order requiring that his deposition be taken only in Atlanta, Georgia (R. 64-69).

On the venue motion facts were shown which established beyond contradiction personal jurisdiction over defendants pursuant to the statute. For those facts confirmed the significant presence and activities of petitioners in the City and State of New York (R. 178-81, 138-39) in connection with these transactions and agreements. The retention of plaintiff by Hogan in New York, the activity of plaintiff and Hogan in New York in furtherance of financing efforts, and more, were all set forth beyond possibility of dispute. The consequence of this factual showing to the Court was such that not only was defendants' motion for change of venue denied, but the motion which sought to change the place of taking of Hogan's deposition—from New York to Georgia—was also denied (R. 189-196).

Petitioners' First Default:

Efforts were begun to fix a date for the commencement of Hogan's deposition. Those efforts encountered a series

of obstacles, which culminated in the default of Hogan to appear at the time and place provided for the commencement of his deposition (R. 224 *et seq.*). That first default was mere symptom of what was to come. Indeed, although the Court's Order gave respondent priority in deposition taking, simultaneous with his announcement of Hogan's non-appearance, his counsel served a notice to take the deposition of a witness—the result of which would have been that by his default Hogan also would have worked a rearrangement in deposition priority. (R. 194-96)

As a result of this studied gamesmanship, respondent moved for an order striking the answer of Hogan and Park, and also, in any event, to nullify the thrust of petitioners' untimely notice to take the deposition of a witness. That application was heard by Hon. Harold R. Tyler, U. S. D. J., who, although declining to grant relief sought under Rule 37(b), nevertheless directed Hogan to appear for his deposition on another date which he fixed therefor, (R. 263, 316-19). And, as at least nominal reflection of his appraisal of petitioners' conduct, he directed that plaintiff recover motion costs on the application. Judge Tyler also provided that the deposition of the witness noticed by petitioners could start only after the new date fixed for Hogan's deposition (R. 316, 319).

Hogan's Deposition:

The oral deposition of Hogan began. It promptly appeared that in preparation therefor Hogan had attended at a conference on the preceding day in New York, at counsel's office, where for some six hours he had reviewed matters germane to the case, not only with his own counsel, but with counsel for the other defendant (R. 452, R. 737-738). It further appeared that a group of documents was discussed and considered at the meeting. (R. 452, R. 743).

As the oral deposition progressed, and as answers given by Hogan demonstrated the existence of documents, material and germane to the case, requests for production thereof were made by respondent (R. 440). The requests were uniformly rejected by Hogan unless, as *quid pro quo,* respondent's counsel were willing to agree *carte blanche* to the production of any documents which petitioners might in the future request for production during deposition taking of the respondent by Hogan. The condition was not acceded to (R. 440). The result was that with one single exception, no documents whatever—whether then at the place of deposition or not—were produced. Since the deposition could not be completed until the pertinent documents had been seen, the deposition was deferred while respondent made a formal Rule 34 motion for discovery (R. 327-331).

The Rule 34 motion set out 9 different specifications of documents, discovery of which was sought (R. 328-330). In many instances the description paralleled and stemmed from answers given by Hogan in the course of his oral deposition. All of the documents sought were documents plainly material to the case (R. 448).

Before the Rule 34 motion was heard, plaintiff also served notice to take the oral depositions of certain witnesses in Atlanta, Georgia. These included petitioners' secret mortgage brokers. On the virtual eve of the scheduled depositions, and despite the fact that subpoenas had already been served out of the District Court in Georgia for most of the deponents, defendants moved for deferral of the depositions, and in any event to require plaintiff to pay the cost of defendants' representation at the taking thereof. Defendants' attempt to delay the deposition was not countenanced by the Court. However, the Court did require that plaintiff advance counsel fees to defendants' attorneys for attendance in Atlanta and pay as well the expenses of such attendance (R. 393, 442, 453, 457).

Counsel went to Atlanta during the week of August 14, 1967. There ensued four days of deposition taking of witnesses (3a).

At the time counsel went to Atlanta, the motion papers under Rule 34 had already been served, and the full swath of the documentary production sought was known. When the Atlanta depositions were completed petitioners' counsel returned to New York and prepared and filed papers in response to the Rule 34 motion (R. 396-424).

Suddenly, petitioners' prior unyielding refusal to produce documents disappeared entirely. Of course, they meanwhile had gained the advantage of a 2½ month delay. However, with one exception which we shall discuss, Hogan and Park raised absolutely no objection to all of the discovery sought (R. 399-400).

Petitioners did not in fact contest respondent's showing of good cause; they did not contest the sufficiency of the description of the documents sought; they did not even suggest that the documents were either not in existence or not within their custody or control (R. 400).

Petitioners did, however, seek one important protection. They told Judge McLean that the documents embraced by the discovery motion fell into two categories. First, there allegedly was a group of documents (whose production would be required) which were already in New York, having been supplied to Petitioners' counsel (R. 400). As to these, petitioners' counsel raised absolutely no difficulty. These, he said, could be examined at his office in New York at mutual convenience (R. 400). However, this group of documents was but "a small portion" of the documents embraced by the motion (R. 400, R. 440).

In respect of the remainder—allegedly located in Atlanta—petitioners' counsel told Judge McLean on the oral

argument that the volume of documents was substantial, amounting to as many as would be contained in three file drawers. The difficulty and inconvenience of moving so large a volume of papers prompted petitioners to request that the Court require respondent to go to Atlanta to examine that group of documents (R. 441).

When Judge McLean learned that counsel for the respective parties had just returned from Atlanta, at respondent's expense—when he realized that the discovery motion was in petitioners' hands at the time of the trip to Atlanta—and (in view of petitioners' non-objection thereto) that discovery could have been accomplished at the same time as counsel were in Atlanta, he, with wisdom, neatly disposed of petitioners' request. He ordered that petitioners had the option of producing the documents in New York, or, if they chose, producing them for inspection in Atlanta, provided, as to the latter, that *they* advanced the expenses and paid a counsel fee of respondent's counsel to go to Atlanta to accomplish the inspection (3a-4a).

Judge McLean made his Order on September 2, 1967. On September 14th respondent's counsel attended at the office of petitioners' counsel to inspect the first group of documents, i.e., those few which had already been in New York at the time of the making of the Rule 34 motion. Copies of 36 documents were produced for inspection at that time, (R. 442).

Even before the inspection of this first group of documents, respondent's counsel had written to petitioners' counsel to inquire whether defendants had decided to produce the Atlanta documents in New York or avail themselves of the alternative provided by Judge McLean's Order (R. 470). Petitioner's counsel wrote that he was "awaiting word from [his] client as to the manner and time of production * * *" of the Atlanta documents. Counsel promised that he would

communicate to respondent his clients' decision (R. 471). That communication never came.

Respondent again demanded that petitioners determine and announce their position with respect to the production of the Atlanta documents (R. 472). By letter of September 15th Hogan's counsel stated—and it is a most important statement—"* * * I am pressing my client to send all of his files relating to this case (including originals of documents to the extent he has them) to me in New York as soon as possible" (R. 474).

Respondent then waited 26 more days. When, by October 11th, no documents had been received from petitioners' counsel, respondent wrote to say that unless it was advised by return mail of petitioners' proposal for compliance with Judge McLean's order an appropriate application would be made to the Court (R. 475-476). Thereafter, plaintiff's attorneys received from petitioners' counsel, without letter of transmittal or other covering document, a photocopy of a letter dated October 16th, 1967, purportedly signed by Hogan and addressed to his own counsel (R. 477). Therein, Hogan casually pushed aside 6½ weeks of default in compliance with Judge McLean's Order with the bland observation *to his counsel* that he had been "* * * required to spend several days in New Orleans" and that "I expect to mail all of these documents to you [Hawkins] no later than Wednesday October 18, 1967" (R. 477-478).

Although Hogan, Park and their counsel knew, as at August 24, 1967 (the date of the Affidavit in response to the Rule 34 motion) that they would voice no objection to the production of any of the documents sought on the motion, the fact is that there was not a single document produced from the Atlanta three-file-drawer location until Saturday, October 21, 1967. That was exactly seven weeks after Judge McLean's Order. If compliance seven

weeks after the Order had resulted in the production of the three file drawers of papers, respondent would have had cause for complaint about the delay—tempered, however, by the presumed fullness of the production. But the *quantum* of documents delivered on October 21, 1967, which had not theretofore been delivered in New York, aggregated *twelve sheets of paper* (R. 443). Petitioners' counsel simply made a photostatic copy of Hogan's letter to him, and that letter, together with its enclosures, became the purported compliance with Judge McLean's Order. Hogan's counsel apparently could not even bring himself to endorse that outrageous position, for he only said "I trust the attached letter and its enclosures are self-explanatory" (R. 477). They were. The letter made clear Hogan's absolute failure to comply with the outstanding discovery Order.

At this stage, and in the face of Hogan's plain refusal to comply with the Order of Court, respondent made application for an order pursuant to Rule 37(b) of the Federal Rules of Civil Procedure striking the answer of petitioners and rendering judgment against them by default for the relief requested in the Complaint (R. 433-435).

The Extent of Petitioners' Default:

Petitioners' utter failure to produce the documents within the categories of Judge McLean's Order was exemplified by reference to only four of the nine categories of documents required to be produced thereunder. Those four categories were (R. 328-29):

> "3. All correspondence, records, files, submissions, appraisals, architects' plans, memoranda or notes concerning or relating to financing, or commitments for financing, sought or obtained from Mutual of New York, the Citizens & Southern Bank or any other lending institution, for the International

Office Park Project or part thereof, International Office Park, Inc., or International Park Corporation (Deposition Transcript pp. 181, 169, 297, 325)."

* * *

"5. All letters, agreements and other writings on or with reference to the acquisition of and disposition of Hogan's interest in International Office Park, Inc., and the acquisition by Hogan or his instrumentality, of the International Park Project or part thereof. (Deposition Transcript pp. 33, 253)."

"6. All correspondence, memoranda and other writings between Hogan and third parties, including, but not limited to, Citizens & Southern Bank; Taylor Bros., Inc.; Barrett & Knight; Philip Barrett; Theodore Knight; Spratlin, Harrington & Thomas, Inc.; William R. Patterson and Frank Coggin, concerning or on the subject of, and the terms and conditions of, the retention of any of these persons, firms or organizations, or others, to obtain financing, temporary or permanent, whether or not consummated, for the International Office Park Project, or part thereof, International Office Park, Inc., and International Park Corporation (Deposition Transcript pp. 343, 344)."

* * *

"8. All proceedings, transcripts, stipulations, settlement agreements, records and other writings relating to or concerning a suit commenced by Surety Investment Co. against Moreland H. Hogan and International Office Park, Inc. in April or May, 1965 (Deposition Transcript p. 99)."

Each of these categories represented something, the existence of which was disclosed and confirmed by the oral deposition of Hogan or of a witness. For example, it was incontestable that in 1965, Hogan and his associates in Office Park had a serious falling-out which resulted in a lawsuit by Hogan's partners against him. Indeed, they appear to have recovered a judgment for more than $3,000,000. This serious dispute was later settled by certain agreements and conveyances of Project property by and among Hogan his associates and their corporations. Further, it was incontestable that Hogan and Park obtained commitments from Mutual of New York for two loans cumulating $3,850,000 (R. 448). These loans were applied for in writing (R.448). Submissions were made in connection with and in support of these loans (R.448). The usual roster of papers, both business and legal, were made and exchanged by and among Hogan, his corporation, and the lender.

Under Category 3 of Judge McLean's Order, defendants were required to produce their files relating to commitments for financing sought or obtained for the International Office Park Project. Their files were not produced. Three pieces of paper were produced in response to Category 3, of which only one related, by any remote standard, to financing sought or obtained from Mutual of New York—a photostat of two checks in payment of fees to Barrett & Knight, defendants' secret mortgage brokers (R. 449). And, although at page 297 of Hogan's deposition (R. 1012) the examiner requested the Closing Statement reflecting the closing of the Mutual of New York loan, plaintiff was supplied instead with a Closing Statement on a Talcott loan (R. 449). Despite the critical importance to plaintiff of production of documents relating to communications and transactions on the

financing sought and obtained from Mutual of New York, not one document reflecting communications between defendants, their representatives and Mutual of New York, was supplied by them (R. 449).

In Category No. 5, defendants originally produced only one document relating to the disposition of Hogan's interest in Office Park. That is the Talcott Closing Statement. Yet, the transaction by which Hogan disposed of his interest in Office Park included, *inter alia,* agreements calling for resolution and settlement of a lawsuit, the division of the International Office Park Project and the closing of a loan in the sum of $2,300,000 (R. 449).

In Category No. 6 there was no compliance with the Order. Referring to the requests set forth at Hogan Transcript Page 344—for the production of the Mutual of New York commitment on the apartment loan and related papers—Hogan stated (before the Rule 37(b) motion was brought) that the Mutual of New York commitment on the apartment loan has been "replaced". Hogan's statement that "these papers are attached hereto" was crossed out (R. 450). As to Category 8, Hogan stated that he had not produced the documents set forth within that category (R. 450). He sought to avoid responsibility for non-production of these documents by the assertion that those documents were not within his possession. But in whose possession were those documents? As Hogan stated, they were at his Atlanta attorney's office. (R. 450).

In sum, before the motion under Rule 37(b) was made, petitioners produced an aggregate, exclusive of duplicates, of 53 documents which in relation to 3 file drawers of records would not even fill a minute portion of one drawer.

The Testimonial Background Against Which Petitioners Defaulted in Production of Documents:

Hogan's oral testimony given during his deposition had critical relation to the default leading to the Judgment. Thus, in the course of examination, one critical matter was whether or not, having made plaintiff "exclusively" the entity through which financing would be obtained, defendants had, *while that agreement was still in effect,* initiated negotiations or communications with other brokers or lending institutions to obtain commitments for financing. Hogan testified, time and time again, that he had *not communicated* with any person, including, specifically, other brokers, about trying to arrange for financing until *after* the cancellation of plaintiff's written agreement on April 4th, 1966. The answers consisted not only of those denials, but embodied as well affirmative statements that no such activity had transpired until *after* April 4th, 1966. Hogan testified that his first such communication took place between April 5th and 10th, 1966. (R. 453).

At the time of his deposition, conscious of his counsel's refusal to produce documents at the deposition, Hogan apparently operated under the delusion that not only would his counsel continue to be successful in blocking discovery of the mountain of documents reflecting Hogan's activities, but that plaintiff might be dissuaded from ever making any effort to procure testimony from other witnesses concerning Hogan's secret activities. Plaintiff was not dissuaded. For, in addition to the Rule 34 motion, plaintiff took depositions of witnesses in Atlanta. Those witnesses' depositions proved many things. But there is one salient fact which stands out above all others. Despite Hogan's preparation for his oral deposition, and despite the unyielding consistency of Hogan's answers under oath, Hogan was by document—documents signed by Hogan—

and by the sworn testimony of others involved with him in these transactions, a crass liar as to matters at the heart of the litigation.

A meaningful sample of these falsehoods falls into at least three categories. First, Hogan uniformly testified that neither he nor his agents had communications with Mutual of New York prior to April 5, 1966. That statement was false. Second, Hogan uniformly testified that he had no communications with a broker (other than plaintiff) prior to April 5, 1966. That was false. Finally, Hogan testified that he had not learned of a commitment for financing from Mutual of New York until the end of April—beginning of May, 1966. That was false (R. 454).

With reference to communications with Mutual of New York, Hogan testified (R. 455).

> "Q Did you ever before April of 1966 submit anything about the project to Mutual of New York or any of its representatives?
>
> A No.
>
> Q Did anybody on your behalf before April of 1966 submit any material about the project to Mutual of New York or any of its brokers or representatives?
>
> A No."

On the subject of communications with Barrett & Knight, or other mortgage brokers, Hogan testified (R. 455):

> "Q Did there come a time, Mr. Hogan, when some financing was arranged with respect to this project with Mutual of New York?
>
> A Yes, in the spring of 1966.
>
> Q Was there a broker on that?
>
> A Yes.

Q Who was the broker?

A Barı ett & Knight.

Q Of what city?

A Atlanta.

Q When for the first time did you ever speak to anybody at Barrett & Knight about financing for this project?

A It was in the—oh, I would say it was after April 5th of 1966."

* * *

"Q We have had the record read back and it indicates that your reference to April 5th was preceded by the word "after," and my question to you now is how is it that you are able to tell me, as you did, that it was after April 5th that you saw the firm of Barrett & Knight?

A Well, I just remember that it was after that time.

Q April 5th is a very specific date.

A I don't know how I am able to remember it. I remember that.

Q Did they come to see you on that day?

A No, I don't believe they came to see me on that day.

Q Did they talk to you on that day?

A They talked to me, I would say, some time between April 5th and April 10th."

* * *

"Q And this is the time which you say you are able to tell us is after April 5th?

A Yes.

Q And that is without question in your mind right now?

A Right."

As to communications concerning commitments for financing procured from Mutual of New York, Hogan testified (R. 456):

"Q When did you close the loan with Mutual of New York?

A I think we closed the office building loan in June, the early part of June.

Q 1966?

A 1966.

Q What was the date, the first date upon which you knew that Mutual of New York had issued a commitment?

A Around the end of April, the first of May.

Q How was it that you came to know that?

A Mr. Barrett had called me.

Q Did he do that in writing or orally?

A The first time, he orally told me."

In contrast to Hogan's testimony, which attempted to erase the trail of his deliberate misconduct, even the limited documents plaintiff was able to adduce from others, and witnesses' oral testimony, showed the following.

The depositions of Philip S. Barrett and Barrett & Knight—Hogan's secret brokers—showed that the first written communication in the Barrett & Knight files concerning the International Park Project was dated February 3, 1966—two months before defendants' purported cancellation of the exclusive agreement with plaintiff. Barrett, having been presented with this communication (which bespeaks even earlier activity on his part), testified (R. 455 *et seq.*)

"Q I appreciate that, but now that you've seen this letter and read it, is your recollection refreshed as to when you first met with Mr. Hogan?

A Then I would say it was the beginning of February rather than the beginning of March.

Q And is your recollection refreshed as to when you first received the communication from Mr. Hogan again?

A It was shortly before this date.

Q Well, let's get the order of things well in hand. Your first communication was with Mr. Coggin [Hogan's attorney].

A Right.

Q And two or three days later you met with Mr. Hogan, is that right?

* * *

A I'll say shortly thereafter.

Q All right. And thereafter you spoke with a representative of Mutual of New York?

A That's true.

Q Is that right? And thereafter you were communicated—you received a communication from Mutual of New York that they wanted an up to date appraisal.

A That's true.

Q And you communicated that fact to Mr. Hogan?

A That's true."

Barrett's testimony clearly showed that this first meeting he described is the same meeting which Hogan described, but for one salient difference. Hogan said it took place between April 5th and April 10th, 1966. Barrett said that the meeting took place at about the beginning of February, 1966, and that shortly thereafter, he communicated with Mutual of New York and so advised Hogan. If Hogan had suggested that Barrett's recollection was not

to be credited in preference to his testimony, that position would be untenable when reference is had to documents consisting of two letters on Hogan's stationery, both of which are dated February 8, 1966 (R. 484). Both were addressed to Mutual of New York. Both on their face indicated copies sent to Barrett. Both proved beyond shadow of doubt that by February 8th Hogan had already begun his covert breach of his agreement with plaintiff.

There was more. By letter of the same date—February 8, 1966—the secret broker, Barrett, wrote Mutual of New York, submitting papers in support of an application for financing, including a formal written application therefor (R. 483-4). A copy of the application itself bore the signature of Hogan (R. 486-7). Thus, those documents, supplied in connection with the deposition of the witness, Barrett, memoralized Hogan's lies, both as to his assertion that he had no communication with Barrett & Knight prior to April 5th, and as to his assertion that there was no authorized communication with Mutual of New York prior to that time. And despite the fact that these very documents were clearly within the requirements of production under Judge McLean's Order, defendants produced their copies of none of them (R. 459-60).

Beyond the fact that Hogan had already made formal application through Barrett & Knight to Mutual of New York by February 8th, it was incontestable that by agreement dated March 8th, he gave a written authorization to Barrett & Knight to obtain a loan commitment for the Project (R. 488). That document proves that Hogan was to pay Barrett & Knight a significantly lower commission than he was then obliged to pay plaintiff under the existing "exclusive agreement". Documents relating to this transaction with Barrett & Knight were required to be produced under Judge McLean's Order. They were not produced.

Finally, Hogan testified that he was not informed of the existence of a commitment for loan financing issued by Mutual of New York until either the end of April or the first of May, 1966. He said that he was advised of it by Barrett orally, and thereafter received written confirmation of that fact. But a letter of commitment issued by Mutual of New York to Hogan's secret brokers, Barrett & Knight, dated April 4, 1967 (R. 488 *et seq.*) and letter from Barrett to Hogan dated April 13, 1966, with which he transmitted to Hogan a copy of the commitment letter (R. 491) shattered Hogan's further attempt to reorient the history of the events which occurred earlier. And Hogan's signature, accepting the commitment, is dated April 18, 1966 (R. 491). All such documents—which like all of the others here involved, were regular, important, business records of a substantial, going business concern*—were required to be produced by petitioners. None of them were.

Petitioners' Response to the Motion Under Rule 37(b):

Petitioners' response to the Rule 37(b) motion was extraordinary. For, in the face of the unassailable fact that most of the documentary production required by the discovery order had not been supplied, petitioners' original response to the motion consisted only of an affidavit from their counsel (R. 497-503). Although the petition does not mention it, Hogan originally submitted no paper to answer, explain or cast light upon petitioners' default.

In response to plaintiff's reference to defendants' earlier proposition that there were about three file drawers of documents responsive to the Order for production, counsel's affi-

*There is substantial authority for the proposition that the law presumes possession or custody by a business of its important records. *Goldman* v. *Checker Taxi Co., Inc.*, 325 F. 2d 853, 856 (7th Cir. 1953), *McDowell Associates, Inc.* v. *Pennsylvania R. R. Co.*, 20 F. R. D. 219 (S. D. N. Y. 1957).

davit tried to explain away the impact of that previous position (R. 499-500). For it was now asserted that what counsel had said in support of defendants' plea that discovery should be held in Atlanta was said *in ignorance* of whether or not the documents existed, and that what counsel had meant was that *if* all the documents encompassed within the discovery order—*which unquestionably had at one time existed*—had been *kept*, this would have amounted to approximately three file drawers of papers (R. 501).* But having said that, and having conceded as he had to, that the documents were documents which demonstrably existed at one time, counsel then entirely failed to supply any hint or suggestion of what might have happened to these three file-drawers of documents to account for their non-production (R. 501 *et. seq.*). And so, while counsel professed his alleged ignorance, petitioners remained mute.

Judge Ryan immediately perceived the utterly disingenuous nature of this straddle. Judge Ryan refused to accept the affidavit of counsel as proper response to the application (R. 562). He directed the filing by Hogan of an affidavit within a specified period of time (R. 563). And it was not just *any* affidavit which Judge Ryan was interested in seeing. He defined with particularity that which the affidavit was required to disclose. For, if petitioners were then going to take the position that they did

*Judge McLean stated in his Order (3a):

> "Some of the documents are in New York. They shall be produced here.
>
> "As to the other documents, the only question is whether they shall be produced in Atlanta where defendants are situated *and where the documents are located*, or in New York." (emphasis supplied)

Plainly Judge McLean was not under the impression that defendants' representations about the Atlanta documents were made in alleged ignorance.

not have these documents any longer, Judge Ryan wanted to know specifically: (a) What efforts had been taken to produce the documents within each category; (b) when those efforts were made; (c) by whom they were made, and (d) with reference to documents allegedly no longer able to be located, an explanation of what had happened to such documents, i.e., whether they had been lost, destroyed or otherwise disposed of (R. 563). The Court also took note of the fact that, although Judge McLean's Order was then more than 2 months old, defendants had the temerity on the return of the motion to announce (without any prior intimation thereof) that certain documents were still allegedly in the process of being gathered and would be supplied in the future (R. 565-66).

Hogan's "Affidavit" was filed a week later (5a, 7a). And against the meaningful and precise requirements defined by Judge Ryan, that "affidavit" was in affront to the Court. First, as Judge Ryan noted, it was not even an affidavit at all.

It developed that this document had apparently been composed by Hogan himself without the intervention or benefit of counsel. The document simply ignored the Court's requirements. It did not supply a particle of the information which the Court required by its previous direction (R. 563 *et seq.*). The Court was not permitted by Hogan to know anything more than Hogan wanted it to know.

Judge Ryan picked up the gauntlet so boldly thrown down by Hogan. He said the document was "insufficient" and "evasive". He held (5a):

> "When this motion was heard by me on November 9, 1967, at argument I directed that the defendants submit an affidavit of HOGAN, explaining the non-compliance of the defendants. This has not been done and, save for a partial production of a small

> portion of the total documents covered by the order, there has been no compliance with the order. A totally insufficient, evasive and inadequate statement of HOGAN has since been filed, but it is palpably insufficient to justify defendants' apparent wilful disregard of Judge McLean's order."

And so it is seen that entirely contrary to the suggestion of the petition (p. 9), Judge Ryan did in fact explicitly find a "wilful" refusal.

Even then Judge Ryan's patience with petitioners was not exhausted. Despite everything, Judge Ryan afforded petitioners still further time in which to produce the required documents, in default of which Judge Ryan said that he would proceed with the entry of judgment (5a). Petitioners' response was another jest. They arranged with one of the witnesses whose deposition had earlier been taken in Atlanta by plaintiff, to produce in New York that witness' files—the very same files which had months earlier been examined by respondent's counsel in connection with the Atlanta deposition of that witness. And so after the additional time had expired petitioners were in the position where they had not produced one single additional document from their files.

Respondent then submitted an order to the Court. Hogan then submitted an affidavit in support of a proposed counter-order. He improvised new explanations of the failure to produce documents, explanations which were totally inadequate to meet the requirements of Judge Ryan's original direction and also so plainly improvised and contrived as last moment material to avoid the impending effectuation of the Court's order that they were simply put aside by the District Judge. Judge Ryan signed respondent's proposed order.

After the entry of judgment, there being no stay, respondent sought pursuant to Rule 69(a) of the Federal

Rules of Civil Procedure to depose petitioners upon oral examination in aid of collection. An application was made to the District Court for an order specifically requiring Hogan's appearance for an examination. That application was denied by Hon. Inzer B. Wyatt, U.S.D.J., on the ground that there was no authority for such an *order*. Judge Wyatt, however, specifically noted the available procedure of serving a routine notice for such examination, and explicitly suggested that in the event the notice was not complied with, appropriate motion could be made to the Court of Appeals in respect of petitioners' then pending appeal. Respondent then served such a notice and, as could be predicted, Hogan defaulted in appearance. It was this default which prompted respondent to move the Court of Appeals for the Second Circuit to bar petitioners from seeking appellate relief while they were continuing their brazen defiance of litigation obligations.

ARGUMENT

PETITIONERS "QUESTIONS PRESENTED" ARE PATENTLY FRIVOLOUS AND PRESENT NOTHING FOR REVIEW BY THIS COURT.

A. Question 1

Petitioners' first "Question" asks:

> "1. Whether a District Court is authorized by Rule 37(b)(2) of the Rules of Civil Procedure to strike the pleadings of a party and enter a judgment by default against him for failure to produce documents pursuant to an order entered under Rule 34 of the Federal Rules of Civil Procedure, in the absence of an affirmative showing that the documents

were at the time of the order in the possession, custody or control of the party."

But how on the facts in this case can this "question" even be asked?

Upon the hearing of the Rule 34 motion petitioners earnestly requested the Court to require that plaintiff conduct its discovery in Atlanta—on the ground of convenience—on the ground that it would be unreasonable in view of the bulk of documents covered—as much as some 3 file drawers full—for defendants to be compelled to bring them to New York.

Surely, however, it is unthinkable that petitioners could have advanced this representation, (which would have, if successful, prompted an order from the Court requiring plaintiff *to return to Atlanta* to examine this group of documents) if in fact the documents sought did not exist, were not in the custody of defendants, or were of a volume so small that a 12¢ stamp could have carried them through the mails first class. Indeed, it is unthinkable that any such prayer for protective treatment could be made unless the proponents thereof affirmatively knew and sponsored to the Court (and must be deemed so to have done) the proposition that existing physical facts were such as to justify such special treatment. In short, defendants cannot in the face of their previous position be allowed to contest that the documents responsive to the discovery order were in existence in their custody in Atlanta and were of such nature and volume as to justify such a burden on the plaintiff. For, if this be not so, then these defendants are and were in the position of having asked the Court for an order which, if granted on their representations, would have required plaintiff to go to Atlanta, paying its own expenses and the ex-

penses of defendants' counsel again, there to be met with the information that there either were no documents in existence required for discovery or that the volume of such documents was miniscule.

What Judge Ryan did here was to draw the very conclusion which defendants urged and prayed Judge McLean to accept—a conclusion Judge McLean did accept. In a sentence, how could defendants accuse Judge Ryan of an "irrational" inference (as they said in the Court of Appeals) in making the inference of existence and custody of the documents for discovery, when it is the very same conclusion they asked Judge McLean to accept based upon their representations? We submit that defendants cannot be heard to contradict themselves in this fashion. By virtue of these prior representations, defendants have admitted the existence of these documents and as such are barred from asserting the contrary.

Even if, *arguendo,* we test defendants' belated, contrived explanation that they did not absolutely represent that there were three file drawers of documents in existence—covered by the discovery order—but that this was only the volume of such papers originally, and only if they had been preserved—the result is the same. Judge Ryan was at least willing to hear from them—under oath—in substantiation of any efforts to locate the required documents and detailing circumstances of their loss or disappearance. But defendants simply refused to respond to the Court's direction. They wanted immunity for discovery granted by their own *ipse dixit.* Since a party who is under compulsion to produce a document concededly once in his possession is under obligation meaningfully to explain his failure to do so (See: *Societe Internationale* v. *McGrath* 11 F. R. D. 294 (D. D. C. 1951), *United States* v. *United Shoe Manufactur-*

ing Corporation 76 F. Supp. 315 (D. Mass. 1948), the Court's inference is separately and independently justified by the failure of defendants to supply the explanation required.

Beyond the direct factual support, there lies the law which undercuts petitioners' first question.

Judge Ryan held that the petitioners' failure to oppose the Rule 34 motion justified an inference that the documents sought for discovery were in existence or under petitioners' control at that time. That inference was clearly correct. *Wharton* v. *Lybrand, Ross Bros. & Montgomery,* 41 F. R. D. 177, 180 (E. D. N. Y. 1966), *Soetart* v. *Coca-Cola Bottling Co.,* 16 F. R. D. 1 (W. D. Mo. 1954); *Schoenberg* v. *Decorative Cabinet Corp.,* 27 F. Supp. 802, 803 (E. D. N. Y. 1939); *Condry* v. *Buckeye S. S. Co.,* 4 F. R. D. 310 (W. D. Pa. 1945); *Tobin* v. *WKRZ, Inc.,* 12 F. R. D. 200 (W. D. Pa. 1952); *William A. Meier Glass Co., Inc.* v. *Anchor Hocking Glass Corp.,* 11 F. R. D. 487 (W. D. Pa. 1951); *Maegeson* v. *Boston and Maine Railroad,* 16 F. R. D. 200 (W. D. Mass. 1954).

The proper method to challenge existence or control of documents sought under Rule 34 is a counter-affidavit on the Rule 34 motion. *Tobin* v. *WKRZ, Inc., supra, William A. Meier Glass Co., Inc.* v. *Anchor Hocking Glass Corp., supra.* Since no such counter-affidavit was filed here on the Rule 34 motion, since most, if not all, of the groups of documents had been affirmatively disclosed and identified by Hogan on his deposition, the making of the Order under Rule 34 justified by itself the inference made by Judge Ryan as to existence and custody or control of the documents by petitioners.

By not opposing respondent's Rule 34 motion on the score of existence, custody or control of any of the docu-

ments therein sought, petitioners surely must be deemed to have waived any right they may have had to object to the order for discovery on that score. Their knowing and deliberate consent to the discovery properly stands as an affirmative admission that at the time of the application the documents sought were not only in existence, but in their custody or control. (So, plainly, did Judge McLean conclude, as evidenced by the language in his Order.)

The authorities establish that failure to advance permissible objections to a Rule 34 motion, at the time of the hearing of that motion, waives those defenses. The waiver precludes re-litigation of those objections on a Rule 37 motion. *Diapulse Corporation of America* v. *Curtis Publishing Company,* 374 F. 2d 442, 445 (2d Cir. 1967).

B. Question 2

Petitioners' second question asks:

> "2. Whether a District Court is authorized by Rule 37(b)(2) of the Federal Rules of Civil Procedure to strike the pleadings of a party and enter a judgment by default against him for failure to produce documents pursuant to an order entered under Rule 34 of the Federal Rules of Civil Procedure, without making an express finding of fact that there has been a willful refusal by such party to produce documents which were at the time of the order in his possession, custody or control."

As we have noted, Judge Ryan made an explicit finding of "willful" refusal. Since the correctness of that conclusion cannot seriously be argued—and certainly not on this Petition—here again the contrived question simply cannot be asked on this Record.

C. Questions 3 and 4

Petitioners ask:

> "3. Whether the order and judgment of the United States District Court for the Southern District of New York striking the answer of the defendants Moreland H. Hogan and International Park Corporation and entering judgments by default against them, which action and judgments were affirmed by the decision and judgment here sought to be reviewed, was "just" as required by Rule 37(b)(2) of the Federal Rules of Civil Procedure.
>
> 4. Whether the order and judgment referred to in the preceding paragraph was, under the facts and circumstances, an abuse of the discretion vested in the District Courts by Rule 37(b)(2) of the Federal Rules of Civil Procedure."

On this Record these "Questions" would be transparently frivolous even under the review which the Court of Appeals would afford. Their sham as certiorari material is *a fortiori.*

F. R. Civ. P. 37(b) explicitly provides that the court may make an order striking out pleadings or rendering a judgment by default against a party guilty of disobedience of a discovery order.

In *Bourgeois* v. *El Paso Natural Gas Co.*, 257 F. 2d 807, 808 (2d Cir. 1958), the Court affirmed a dismissal of the complaint because of plaintiff's willful failure to appear for the taking of his deposition. See also: *Campbell* v. *Johnson*, 101 F. Supp. 705, 707 (S. D. N. Y., 1951); *White Pine Copper Co.* v. *Continental Ins. Co.*, 166 F. Supp. 148, 161 (W. D. Michigan, 1958).

In *Trans World Airlines, Inc.* v. *Hughes*, 332 F. 2d 602, 614 (2d Cir. 1963) *cert. den.* 380 U. S. 248 (1965) the Second Circuit observed:

> "In the light of all these circumstances, the district court was not obliged to employ sanctions less severe than the dismissal of the counterclaims with prejudice. Whatever lesser sanctions might have sufficed with regard to the documents withheld by the defendants, it seems to us that a dismissal of the counterclaims was appropriate, in view of Hughes' intransigence after intensive and expensive discovery proceedings already protracted for more than one year."

Unless the District Court's discretion was plainly abused, its decision should not have been disturbed by the Court of Appeals. *Graves* v. *Mt. Vernon Trust Co.*, 69 F. 2d 101 (2d Cir. 1934). See also: *Delno* v. *Market Street Ry. Co.*, 124 F. 2d 965, 967 (9th Cir. 1942).

Two recent cases make clear the absolute correctness of Judge Ryan's determination. *Jones* v. *Uris Sales Corp.*, 373 F. 2d 644 (2d Cir. 1967); *Diapulse Corp. of America* v. *Curtis Publishing Co., supra.*

D. Questions 5 and 6

Petitioners ask:

> "5. Whether, after striking the answer of a defendant for failure to produce documents pursuant to an order entered under Rule 34 of the Federal Rules of Civil Procedure, a District Court has authority under Rule 37(b)(2) of the Federal Rules of Civil Procedure to enter a judgment by default against the defendant where the defendant, a resident of a State other than that in which the court is located, has in his pleadings, by way of an affirmative defense, challenged the court's jurisdiction on the

ground it has no jurisdiction of the person, and there has been no determination of that issue.

6. Whether the entry of a judgment by default against a defendant in the circumstances set out in the preceding paragraph would deprive the defendant of due process of law in violation of the Fifth Amendment to the Constitution of the United States."

Dealing with the latter question first, petitioners' point of law has already been litigated and decided by this Court. Rule 37(b)(2) specifically provides that an answer may be struck and default judgment entered where a litigant disobeys court orders in respect of a Rule 34 discovery motion. Such relief does not deprive a litigant of due process of law. *Hammond Packing Company* v. *State of Arkansas,* 212 U. S. 322 (1909), *National Union of Marine Cooks and Stewards* v. *Arnold,* 348 U. S. 37 (1954). The rationale announced by this Court is that the answer of a litigant who comports himself in defiance of court orders may be presumed to be in bad faith and untrue.

Finally, putting aside the fact that petitioners' personal jurisdiction point was so patently frivolous that it was not raised or argued before Judge Ryan or before the Court of Appeals, putting aside the fact that petitioners' inattention to this point plainly reflects that the facts established on the venue motion demonstrate valid personal jurisdiction under the New York long arm statute, and putting aside the fact that petitioners' participation in post-judgment, but jurisdictionally ancillary proceedings, constituted a further submission to jurisdiction, the ultimate point is that, in any event, this so-called defense, like all other defenses in petitioners' answer, is subject to striking on account of petitioners' adjudicated default.

There is nothing sacrosanct about that part of petitioners' answer which alleged a defense of lack of personal jurisdiction. Petitioners' entire answer—presumed by the law to be in bad faith and untrue—might theoretically have contained other defenses of possible merit. But with the exception of subject matter jurisdiction, (the absence of which cannot be waived), personal jurisdiction may be waived, and the refusal of petitioners to make discovery pursuant to Court Order stands clearly as conduct equivalent to waiver. See: *Redditt* v. *Hale,* 189 F. 2d 386 (8th Cir. 1952); Federal Rules of Civil Procedure, Rule 12(h). See also *Goldlawr* v. *Heiman,* 288 F. 2d 579, 584 (2d Cir. 1961), rev'd on other grounds, 369 U. S. 463 (1962).

In any event this newly resurrected defense was abandoned by petitioners' failure to assert it before the Court of Appeals for the Second Circuit. *Lawn* v. *United States,* 355 U. S. 339, 362 (1958); *California* v. *Taylor,* 353 U. S. 553, 556 (1957); *Larkin* v. *United Association of Journeymen, etc.,* 338 F. 2d 335, 336 (1st Cir. 1964), *cert. den.* 380 U. S. 975 (1965); *Abrams* v. *American Security & Trust Co.,* 111 F. 2d 520 (D. C. Cir. 1940); *Bumpus* v. *Remington Arms Co., Inc.,* 183 F. 2d 507 (8th Cir. 1950); *J. F. White Engineering Corporation* v. *United States,* 311 F. 2d 410 (10th Cir. 1962). See also: *Dower* v. *United Air Lines, Inc.,* 329 F. 2d 685 (9th Cir. 1964); *Maher* v. *Cities Service Pipe Line Company,* 286 F. 2d 313 (10th Cir. 1960).

As final response to the Petition, we call attention to petitioners' continuing defiance of requirements of the Rules—most recently manifested by their failure to attend and be examined pursuant to the requirements of Rule 69(a) of the Federal Rules of Civil Procedure. In that posture petitioners should not be allowed to invoke the procedures of the courts for their benefit even if, unlike

this case, they had meritorious points to present. *National Union of Marine Cooks & Stewards* v. *Arnold,* 348 U. S. 37 (1954). The clean hands doctrine is essentially but a variant expression of the grounds upon which the Court should close its portals to litigants who conduct themselves in a manner fundamentally inconsistent with their obligations as litigants. *United States* v. *Morgan,* 307 U. S. 183 (1939), *Cochran* v. *Burdick,* 89 F. 2d 831 (D. C. Cir. 1937).

CONCLUSION

If this Court were transmuted into a Court of Appeals nothing contained in the Petition would cause the Court in the slightest degree to disturb the judgment of the District Court. Where, as here, the underlying points advanced by petitioners not only lack legal merit as well as factual foundation, but lack as well any remote relationship to the additional requirements necessary for certiorari jurisdiction, the Petition should be in all respects denied.

Respectfully submitted,

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